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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

FRIENDS OF YOSEMITE VALLEY,
et al.

Plaintiffs,

v.

DIRK KEMPTHORNE, in his official
capacity as Secretary of the
Interior, *et al.*,

Defendants.

Case No. CV-F-00-6191 AWI DLB

**DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR STAY
OF INJUNCTION PENDING APPEAL
EXPEDITED HEARING REQUESTED**

DATE: February 26, 2007
TIME: 1:30 p.m.
COURT: Courtroom 2
JUDGE: Hon. Anthony W. Ishii

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I. INTRODUCTION

The defendants, Secretary of the Interior Dirk Kempthorne, *et al.*, file this memorandum in support of their motion for a partial stay pending appeal of the Court's November 3, 2006, Memorandum Opinion and Order Re Plaintiffs' Request for Injunction (Injunction Order). In the Injunction Order, the Court set aside the Revised Merced River Plan adopted by the defendants in 2005 and granted plaintiffs' request to enjoin, in whole or part, nine specific projects that the National Park Service (NPS) had proposed to conduct and implement in Yosemite National Park (park). On December 28, 2006, the defendants timely filed a notice of appeal from the Injunction Order.^{1/}

The defendants' motion for stay pending appeal is limited to two paragraphs of the Court's Injunction Order, each of which enjoins a specific project. First, the defendants move to stay the permanent injunction for the East Yosemite Valley Utilities Plan (Utilities Plan), including the Capital Improvements Plan (CIP). Injunction Order, ¶ 8. For the reasons explained below, unless a stay is granted, the permanent injunction is extremely likely to result in irreparable injury to the public and to the natural resources of the Merced River including several "outstandingly remarkable values" (ORVs) for which Congress has designated the river for protection under WSRA, as well as harm to the defendants who are responsible for complying with the governing laws and managing Yosemite National Park. A stay pending appeal will allow the park to continue with the essential repairs, rehabilitation, and maintenance of the

^{1/} The defendants also appealed from the Court's underlying summary judgment ruling entered on July 19, 2006, which contains the findings of fact and conclusions of law that serve as the predicate for the injunction entered on November 3, 2006. The July 19 Summary Judgment Opinion and Order was not appealable, by itself, until the Court entered injunctive relief because the Court has not yet entered final judgment on the plaintiffs' Supplemental Complaint. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002)(government's appeal from interlocutory injunction confers jurisdiction over "matters inextricably bound up with the injunctive order from which appeal is taken"), *citing Self-Realization Fellowship Church v. Ananda Church of Self Realization*, 59 F.3d 902, 905 (9th Cir. 1995). The Court held a telephone hearing on January 9, 2007, regarding a deadline for the defendants to complete a new Merced River comprehensive management plan (CMP) pursuant to the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-87. On January 19, 2007, the parties submitted a joint stipulation requesting that the Court set that deadline for September 30, 2009, and enter final judgment with regard to the Supplemental Complaint.

1 antiquated and inefficient utilities systems, including pipelines that carry raw, untreated sewage
2 through many sensitive locations in Yosemite Valley. The current injunction preventing the NPS
3 from further work on the Utilities Plan – and which is likely to remain in place at least until
4 September 30, 2009, when the park plans to issue a record of decision for a new plan – is very
5 likely to result in preventable spills of sewage that will irreparably and adversely impact the
6 resources of the park and the public health and safety. The injunction against the Utilities Plan
7 places the defendants in the untenable position of confronting violations of the mandatory Clean-
8 Up and Abatement Order (CAO) issued by the State of California in 2000 pursuant to the Clean
9 Water Act. This will occur because the injunction prevents the defendants from taking
10 “whatever means are necessary to abate discharges of untreated wastewater” and thereby
11 preventing a recurrence of sewage spills that harm the Merced River. The resulting water quality
12 degradation will harm both the public and the natural resources within the river corridor. In
13 support of the stay motion, the defendants provide persuasive evidence, exhibits, and
14 documentation from qualified and credible expert witnesses to demonstrate the compelling need
15 to stay the injunction pending appeal. This evidence, presented through the attached declarations
16 of Alexander R. Peterson and Jeffrey D. Harsha, supplements the evidence previously provided
17 to the Court, for which the plaintiffs have not offered any credible engineering, scientific, or
18 other evidence to rebut the defendants’ showing of the urgent need for relief.

19 Second, the defendants move to stay ¶ 12 of the Injunction Order, which prevents the
20 park from continuing with essential repairs and rehabilitation of the Yosemite Valley Loop Road.
21 Unless a stay of that portion of the injunction is granted, the defendants will be prevented at least
22 until September 30, 2009, from making repairs that are absolutely essential for public safety.
23 The Loop Road provides the exclusive means of access to Yosemite Valley, not only for all
24 visitors to the park, but also for emergency fire and health services, law enforcement, and all park
25 service vehicles. The defendants provide the attached Declaration of Patrick Flynn, an engineer
26 with the Federal Highway Administration, to demonstrate the urgent need for a stay of the
27 November 3 Injunction Order with regard to the Loop Road repairs. Mr. Flynn’s testimony,
28

1 corroborated by the attached Eighth Declaration of Michael J. Tollefson, Superintendent of
 2 Yosemite National Park, demonstrates that the road simply cannot wait for several more years
 3 before beginning the much-needed and long overdue work on critical road repairs.
 4 Superintendent Tollefson again confirms that the road repair work will not increase access to, or
 5 use of, the Merced River in any way that would prejudice future planning through the new CMP.
 6 Continuing the injunction for several years will mean a very strong probability that the road will
 7 fail in one or more places, jeopardizing all access to Yosemite Valley. This is an essential issue
 8 of public safety that must be addressed now. Failure to grant a stay will impose serious and
 9 irreparable injury on the public, and the Merced River and its ORVs, and the park itself.

10 Because failure to grant the relief requested will result in immediate and irreparable
 11 injury, the defendants request that the Court expedite its consideration of this motion in the same
 12 manner that the Court ruled promptly on the plaintiffs' similar request for an injunction pending
 13 appeal in April 2004. The defendants have noted this motion for hearing on February 26, 2007,
 14 in accordance with the Local Rules, and the plaintiffs should have an opportunity to respond to
 15 the motion and the new declarations being filed today. In order to expedite a decision, however,
 16 the defendants are willing to waive both the right to file a reply brief and a hearing on the motion
 17 if the Court does not believe that a hearing is necessary and if doing so would expedite the
 18 Court's decision. If relief is denied in this Court, the defendants would intend to file a motion
 19 seeking similar relief from the Ninth Circuit at the earliest opportunity.

20 II. BACKGROUND

21 On July 19, 2006, the Court issued a "Memorandum Opinion and Order Re: Cross-
 22 Motions for Summary Judgment." Docket No. 307, Friends of Yosemite Valley v. Scarlett, 439
 23 F.Supp.2d 1074 (E.D.Cal. 2006)(FOYV v. Scarlett). The Court granted, in substantial part, the
 24 plaintiffs' motion for summary judgment. The Court deferred ruling on the plaintiffs' request for
 25 injunctive relief, which it addressed through a separate proceeding. *Id.* at 1108. On November 3,
 26 2006, the Court entered the Injunction Order, declining to grant an injunction against "all ground-
 27 disturbing activities," but granting a broad injunction against the nine specific projects that the
 28

1 park had planned to pursue within the Merced River corridor. Docket No. 364, Friends of
 2 Yosemite Valley v. Kempthorne, ___ F.Supp.2d ___, 2006 Westlaw 3201108 (E.D.Cal. Nov. 3,
 3 2006)(FOYV v. Kempthorne). The injunction, by its terms, will remain in place until the
 4 defendants have issued a “valid CMP” that complies with WSRA and a new environmental
 5 impact statement under National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-44.

6 The Court postponed setting a deadline for completing the new CMP at that time, but
 7 directed the parties to submit their respective proposed timetables. On December 1, 2006, the
 8 defendants proposed a 33-month schedule for completing the CMP, listing the interim steps and
 9 statutory requirements that apply to the process. Docket No. 370. On December 14, 2006, the
 10 plaintiffs responded, stating that, with certain qualifications, that they did not oppose the
 11 defendants’ 33-month timetable. Following a telephone hearing on January 9, 2007, the parties
 12 submitted a joint stipulation and proposed order on January 19, which requested that the Court
 13 order the defendants to complete the new CMP by September 30, 2009.

14 III. ARGUMENT

15 A. Standard of Judicial Review on Motion to Stay Injunction Pending Appeal

16 The Ninth Circuit evaluates requests for injunctions pending appeal under the same
 17 standards employed by district courts in evaluating motions for preliminary injunctive relief. *See*
 18 Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir.), *rev’d in part on other grounds*, 463 U.S. 1328
 19 (1983). Criteria identical to those used to determine injunctive relief govern requests for a stay
 20 pending appeal. *See e.g.*, Andreu v. Ashcroft, 253 F.3d 477, 480 (9th Cir. 2001) (*en banc*). In
 21 environmental litigation, the basis for injunctive relief is irreparable injury and inadequacy of
 22 legal remedies. Amoco Production Co. v. Village of Gambell Alaska, 480 U.S. 531, 542 (1987).
 23 A party seeking an injunction must demonstrate the requisite degree of irreparable injury and, in
 24 addition, demonstrate that the balance of harms and the overall public interest warrant the
 25 specific relief sought. A movant must show either a probability of success on the merits and the
 26 possibility of irreparable injury or that serious legal questions are raised and the balance of
 27 hardships tips sharply in petitioner’s favor. *See* Artukovic v. Rison, 784 F.2d 1354, 1355 (9th
 28 Cir. 1986). These standards represent the outer extremes of a continuum, with the relative

1 hardships to the parties providing the critical element in determining at what point on the
2 continuum a stay pending review is justified. *See Lopez*, 713 F.2d at 1435.

3 While the burden of justifying interim relief lies with the movant, *Granny Goose*
4 *Foods, Inc. v. Teamsters*, 415 U.S. 423, 442-443 (1974), the district court is vested with
5 reasonable discretion when determining whether to grant a stay. *See A & M Records, Inc. v.*
6 *Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001), *citing Gorbach v. Reno*, 219 F.3d 1087, 1091
7 (9th Cir. 2000) (*en banc*). As described below, the defendants demonstrate serious questions
8 going to the merits, and the balance of hardship involved tips sharply in favor of a stay of the
9 injunction pending appeal for the two projects at issue.^{2/}

10 **B. The Court Should Stay the Injunction for the Two Projects at Issue**

11 **1. The Injunction Will Cause Irreparable Injury, and the Balance of Harms** 12 **Strongly Favors a Stay Pending Appeal**

13 **a. East Yosemite Valley Integrated Utilities Master Plan**

14 The Court granted the plaintiffs' request to enjoin further work on Phases 2 and 3 of the
15 Integrated Utilities Master Plan (IUMP) and Phase 2 of the Capital Improvement Plan (CIP).
16 Docket No. 364, 2006 WL 3201108, slip op at 9-11, 18. Collectively, Phases 1, 2, and 3 of the
17 IUMP and Phases 1 and 2 of the CIP comprise the East Yosemite Valley Utilities Improvement
18 Plan. In 2004, the Court had allowed the park to proceed with both Phase I of the IUMP and
19 Phase I of the CIP (referred to as "Option 1" by the parties and the Court). Memorandum
20 Opinion and Order Re Defendants' Motion to Modify Injunction to Allow Sewage System
21 Repair to Comply with Clean-up and Abatement Order, Doc. 244. In authorizing the park to
22 conduct that work, the Court agreed with the defendants regarding the urgency to comply with
23 the CAO. "Indeed, the court is convinced that there is a serious risk that irreparable injury will
24

25 ^{2/} The defendants note that, on April 6, 2004, the plaintiffs in this case sought similar relief
26 in the form of an affirmative injunction (rather than a stay) pending appeal. Docket No. 187.
27 Although this Court expeditiously ruled on and denied that request on April 7, 2004, Docket No.
28 189, the Ninth Circuit promptly granted injunctive relief to the plaintiffs less than two weeks
later, on April 20, 2004. *Friends of Yosemite Valley v. Norton*, 366 F.3d 731 (9th Cir. 2004).
The Court should refer to the plaintiffs' motions filed in this Court and the Ninth Circuit and act
promptly to apply the same standard of judicial review to the defendants.

1 occur if Option 1 is not implemented as soon as possible.” Doc. 244 at 24. The Court “finds that
2 the public interest clearly weighs in favor of implementing the repairs specified by Defendants,
3 not only to comply with the CAO, but also to protect public health and the precious
4 Outstandingly Remarkable Values of the Merced River.” *Id.* “The court finds that it is in the
5 public’s interest that repairs and improvements be done in the most practical, cost-effective way,
6 and will not attempt to micro-manage the matters which NPS is mandated to handle.” *Id.* In
7 light of that ruling, the park has continued to perform the repair work authorized under Option 1.

8 On November 3, 2006, however, the Court reversed course and granted the plaintiffs’
9 request to enjoin all further work in Phases 2 and 3 of the IUMP and portions of Phase 2 of the
10 CIP. 2006 WL 3201108, slip op at 9-11. Although the only evidence that the plaintiffs cited
11 consisted of references to the EA and FONSI for the East Yosemite Valley Utilities Improvement
12 Plan, the Court accepted the plaintiffs’ allegations and declined to accept the defendants’ expert
13 declaration from the principal engineer responsible for working with the park to implement the
14 IUMP and CIP projects.

15 The defendants now provide additional evidence in support of the motion for stay of the
16 injunction pending appeal, including the attached Declaration of Jeffrey D. Harsha and the Fifth
17 Declaration of Alexander R. Peterson, to demonstrate the urgent need to allow this utility repair
18 work to proceed without further delay. Mr. Peterson is a Senior Engineer and Principal with the
19 firm of Kennedy/Jenks Consultants, Engineers and Scientists. Peterson Fifth Declaration, ¶ 1.
20 He is responsible for “project engineering and project management with Yosemite National Park
21 wastewater projects including providing technical assistance regarding Park compliance planning
22 for the August 2, 2000, Cleanup and Abatement Order (CAO) from the California Regional
23 Water Quality Control Board, for the September 2002 Yosemite Valley Sanitary Sewer System
24 Capital Improvement Plan (CIP),” as well as the Integrated Utility Master Plan (IUMP). *Id.* Mr.
25 Peterson has submitted several prior declarations in this case, which the defendants incorporate
26 by reference for background. *See* Docket Nos. 228, 237, 334.

27 As Mr. Peterson notes, his firm prepared the integrated CIP and IUMP plans to present
28 “an ecologically preferred and cost effective means to complete the rehabilitation of the sewer

1 system required by the CAO.” *Id.*, ¶ 2. One goal of the IUMP was “to remove deteriorated
2 utilities from waterways, meadows, and riparian areas and relocate them in consolidated utility
3 corridors under existing roadways.” *Id.* Those portions of the sewer system not located in
4 sensitive areas would be repaired pursuant to the CIP. He classified sections of the sewer system
5 needing repair based on two principal factors, the severity of the defect and professional opinion
6 regarding the probability that failure could result in a sanitary sewer overflow. *Id.*

7 The Court previously authorized the park in October 2004 to conduct the emergency and
8 immediate repairs included in Option 1. Mr. Peterson reports that the “work involved in Option
9 1 is nearly complete.” *Id.*, ¶ 3. As he notes, however, several elements of that work still remain
10 to be done. For a list of the remaining Option 1 work, *see* Harsha Declaration, ¶¶ 6-7.

11 To comply with the CAO, which mandates that the NPS correct the leaking and failing
12 sewage collection system, the park “prepared the CIP to identify deficiencies and necessary
13 corrective actions for the sewer system to ‘abate discharges of untreated wastewater.’” *Id.*, ¶ 3.
14 The park concurrently prepared the IUMP to “identify alternatives for utility routing so that
15 utilities could be removed from meadows and sensitive areas (such as within the Merced River
16 corridor), while also rectifying system deficiencies identified in the CIP.” *Id.*, n.1. While the
17 Court did allow the park to proceed with the “Option 1” repair work in 2004, and while most of
18 that work is nearly complete, several elements are unfinished, including construction of the
19 Yosemite Village Lift Station, which the park expects to complete in April 2007. *Id.*, ¶ 6. That
20 lift station is “critical to the functionality of Option 1 because it eliminates the need to make
21 repairs to approximately 3000 linear feet of pipe in meadows and ethnographically sensitive areas
22 adjacent to Yosemite Creek,” along with providing backup storage capacity in case of
23 mechanical failure. *Id.* If that work is not allowed to proceed, “great harm could continue to the
24 park’s natural and cultural resources,” including contamination of ground water from “allowing
25 sewage to migrate from defective sewer lines to the soils surrounding the pipes.” *Id.*, ¶ 7.
26 “Sensitive ethnographic sites will ultimately be destroyed from emergency repairs that will
27 undoubtedly occur due to the poor condition of the sewer pipes in these areas.” *Id.*

28 Contrary to the plaintiffs’ incorrect and unsubstantiated representations, “Option 1 did not

1 include all of the repairs in the ‘emergency’ and ‘immediate’ categories. As discussed below,
2 there remain 40 pipe segments that have repairs falling into the emergency and immediate
3 categories.” Peterson Fifth Declaration, ¶ 4. Mr. Peterson notes that a “segment” is “a portion of
4 pipe measured from manhole to manhole.” *Id.*, ¶ 5. “Sixteen of these segments are located in
5 highly sensitive resource areas. These are indicated in Exhibit A as being located in meadows,
6 riparian areas, or waterways.” *Id.* Of those 40 segments still to be done, 28 are classified as
7 “emergency” and 12 are “immediate” repairs. *Id.* Although NPS has tried to manage those
8 segments in an effort to mitigate the risk of spills, “if NPS is prevented from addressing these
9 deficiencies for months or even years, the likelihood of spills increases dramatically.” *Id.*

10 Mr. Peterson provides a statement regarding each segment’s deficiency and recommended
11 repair in Exhibit A. *Id.*, ¶ 6. “Deficiencies include specific condition-related repairs resulting
12 from structural damage or flow volume deficiencies resulting from a combination of pipe
13 diameter and slope that do not meet current engineering standards.” *Id.* He provides a map in
14 Exhibit B to identify the location of each of the segments listed in Exhibit A, with color-coded
15 lines to indicate work completed to date (purple), as well as remaining emergency (red) and
16 immediate (yellow) lines. *Id.*, ¶ 6 & Exhibits A-B.

17 Of particular relevance for the motion for stay of the injunction pending appeal, Mr.
18 Peterson testifies that “delay of the CIP Phase 2 and IUMP Phases 2 and 3 work would increase
19 the likelihood of system failure at any of the 40 locations, resulting in sewer spills, emergency
20 cleanup, and repairs within sensitive habitats. If such a failure were to occur, the NPS would
21 have to undertake work which would necessitate digging up and repairing lines in meadows,
22 wetlands, and riparian habitats.” *Id.*, ¶ 7. This testimony demonstrates both the need for relief to
23 allow these repairs to protect the public health and the need to avoid harm to the ecologically
24 sensitive habitats along the Merced River corridor, which will be damaged irreparably from any
25 future sewage spills and the need for emergency repairs in those sensitive areas.

26 Those harmful impacts can be avoided by allowing the sewer line repair work to continue
27 because “Phases 2 and 3 of the IUMP were specifically designed to avoid construction or repairs
28

1 in sensitive areas.” *Id.*, ¶ 8. Mr. Peterson lists three specific examples to demonstrate his point.
 2 First, the West Yosemite Village Corridor Project segment would eliminate 11 of the remaining
 3 segments in the CIP, which have been identified as having deficient conditions. *Id.* Second,
 4 Phase 2 of the IUMP, which includes a wastewater pump station and pumped pipeline through
 5 the Lower Pines Campground to the new Curry Village Lift Station would eliminate the need for
 6 five segment repairs, including one river crossing. *Id.* Finally, the Ahwahnee Corridor Project
 7 would eliminate 12 segment repairs, “all of which are in meadows or waterways.” In addition, a
 8 small segment of line connected to the lift station would eliminate four more segments, including
 9 three in meadows. *Id.* Mr. Peterson emphasizes that, “by completing this work in accordance
 10 with the IUMP, rather than the in-place repairs called for in the CIP, one river crossing would be
 11 avoided as would 16 segment repairs in meadows or waterways.” *Id.* These unquestionably are
 12 positive benefits to the environmental protection of the Merced River corridor and serve to tip
 13 the balance convincingly in favor of allowing this essential repair work to proceed without delay.

14 Mr. Peterson summarizes his testimony by averring that, if the injunction is stayed, “all
 15 remaining emergency and immediate repair segments would be completed in a manner that
 16 causes far less disruption to meadow and riparian areas along the Merced River.” *Id.*, ¶ 9. In
 17 contrast, “[c]ontinued delay of repairs as a result of the current injunction would greatly increase
 18 the likelihood of system failure, allowing already compromised segments of sewer line to further
 19 deteriorate.” *Id.*, ¶ 10. “The projects identified in Exhibit A and shown in Exhibit B were
 20 originally identified as needing to be completed by 2004 for those rated ‘emergency’ and 2005
 21 for those rated ‘immediate’ projects. These dates were based on an opinion as to risk of
 22 occurrence of a sewer spill.” *Id.* “If the NPS were allowed to proceed with repairs, the earliest
 23 completion schedule for the remaining 40 segments would be fall of 2008. If an injunction were
 24 to remain in place for an additional 18 months, this would result in a late 2009 completion date,”
 25 which is three or four years after the completion dates provided to the Regional Water Quality
 26 Control Board for emergency and immediate repairs. *Id.* If the injunction remains in place, the
 27 “risk of sewer system spills and overflows will increase dramatically if the NPS is prevented
 28

1 from undertaking these repairs for that period of time.” *Id.* That clear risk of truly irreparable
2 and serious harm to the resources of the Merced River and to the public simply should not be
3 allowed to continue.

4 Mr. Peterson’s testimony and his concerns regarding the risk of irreparable injury are
5 corroborated in the attached Declaration of Jeffrey D. Harsha, a Civil Engineering Technician
6 and Project Manager with NPS for the past nine years who has worked with the utility
7 infrastructure in Yosemite Valley for 12 years. Harsha Declaration, ¶ 1.

8 As Mr. Harsha explains, the park has worked diligently and steadily for the past five years
9 to develop “a redesigned and reconstructed sewer system that will eliminate sewer spills as a
10 result of condition defects and/or flow problems.” *Id.*, ¶ 2. He states that court-ordered delays
11 “will threaten the ability of YNP to comply with the State Cleanup and Abatement Order and
12 could result in harm to the visiting public by exposing them to spills of raw sewage, disruption of
13 sewer services as a result of emergency repairs, and possible contamination of surface waters.”
14 *Id.* These concerns, he emphasizes, “are not hypothetical, but reflect the experience of actual
15 spills that have occurred over the past several years (See Exhibit A).” Exhibit A to his
16 declaration, a chart containing a Summary of Sewage Spills in Yosemite Valley since March
17 2000, bears out his testimony regarding the reality of the continuing harm caused by sewage
18 spills. During the two years between October 2004 (when the Court authorized the limited
19 Option 1 repairs) and November 2006 (when the Court reinstated the injunction), 11 more spills
20 occurred. These include seven spills during 2005, with an estimated total of 10,500 gallons of
21 sewage, including one spill of 6,200 gallons in June 2005 that reached and contaminated the
22 Merced River. Four more spills occurred during 2006, with more than 800 gallons of sewage
23 discharges. Completion of Option 1 work alone clearly will not suffice to abate future sewage
24 spills. Rather, the comprehensive overhaul outlined in the IUMP portions of the CIP is the only
25 responsible engineering and management choice. As Mr. Harsha explains, delays in the
26 implementation of the remaining IUMP and CIP work will “result in the continued
27 contamination of ground water by allowing sewage to migrate from defective sewer lines to the
28 soils surrounding the pipes.” Harsha Declaration, ¶¶ 2, 13, 14.

1 The park thus faces a stark choice among three alternatives: (a) do nothing and confront
 2 violations of the CAO, including monetary fines, which will occur if the injunction remains in
 3 force; (b) complete the repairs in-place under the CIP by performing “extensive and disruptive
 4 work in sensitive meadow and riparian areas;” or (c) implement the repairs as described in
 5 Phases 2 and 3 of the IUMP by minimizing work in these sensitive resource areas, which could
 6 occur only if the Court stays the injunction. *Id.*, ¶ 8. Mr. Harsha then explains that the third
 7 option (c) is far preferable to conducting the repairs in place because, if all repairs are conducted
 8 according to the CIP rather than the IUMP, then far more environmental disruption will occur.
 9 *Id.*, ¶ 9. “A majority of the remaining repairs in CIP Phase 2 would require extensive
 10 excavations in Ahwahnee and Cook’s Meadows, areas adjacent to and on the banks of the
 11 Merced River, in wetlands areas, across Yosemite Creek, and through ethnographically sensitive
 12 areas.” *Id.*

13 By contrast, the IUMP was developed specifically in order “to minimize future damage to
 14 the natural and cultural resources of Yosemite Valley while providing a sewer system that meets
 15 today’s standards.” *Id.*, ¶ 10. Mr. Harsha explains that work under “Phases 2 and 3 of the IUMP
 16 would allow compliance with the CAO but in a far more environmentally beneficial manner than
 17 the CIP because the IUMP largely eliminates the need to excavate and repair or replace sewer
 18 lines in sensitive meadows and riparian areas.” *Id.*, ¶ 11.^{3/} Mr. Harsha testifies that, in his
 19 professional opinion as an experienced civil engineer, it is “imperative that the NPS be allowed
 20 to proceed with the critical sewer system repairs that remain to be done,” including 12 segments
 21 in the “emergency” category. *Id.*, ¶ 12. “Structural and physical deficiencies exist in these
 22 pipelines, as well as in others categorized for immediate repair. They all must be repaired to
 23 prevent additional blockages, sewage spills and further degradation of the pipelines.” *Id.* If the
 24 Court refuses to stay the injunction pending appeal, however, then “[a]ny delays in the
 25 implementation of the needed repairs will also result in the continued contamination of ground
 26 waters by allowing sewage to migrate from defective sewer lines to the soils surrounding the
 27

28 ^{3/} Segments of the sewer system not located in sensitive areas would be repaired in
 accordance with the CIP. Peterson Fifth Declaration, ¶ 2.

1 pipes and could lead to harm to the visiting public by potentially exposing them to raw sewage
2 spills in public areas.” *Id.*, ¶ 13. The expert professional opinions of these two civil engineers
3 regarding the urgent need to continue work on the IUMP and CIP repairs provide persuasive and
4 irrefutable evidence regarding the need to stay the injunction pending appeal so that the utility
5 repairs can proceed forthwith.

6 **b. Yosemite Valley Loop Road**

7 The defendants also move to stay the injunction with regard to the Yosemite Valley Loop
8 Road Project. The Court reviewed the parties’ respective claims in the November 3 Injunction
9 Order, 2006 WL 3201108, slip op at 15-16. The Court recognized that “[m]aintenance of the
10 Loop Road clearly provides a benefit to the public, as the road is used by virtually all visitors to
11 Yosemite Valley.” The Court nevertheless found that the park’s Finding of No Significant
12 Impact (FONSI) for the project “relied on the invalid 2005 Revised CMP. Combined with the
13 increased use facilitated by the project and the potential impact to the Merced River ORVs, this
14 factor tips the balance in favor of the issuance of injunctive relief. Accordingly, all portions of
15 the Loop Road project except for the repair and replacement of culverts will be enjoined pending
16 completion of the valid CMP.” *Id.* at 16. Thus, the Court relied on three factors as the basis for
17 the injunction, finding that: repairs to the Loop Road would facilitate increased use; the project
18 had the potential to impact Merced River ORVs; and the FONSI had relied on the 2005 CMP,
19 which the Court set aside.

20 The defendants respectfully disagree with the Court’s findings and conclusions, as well as
21 the manner in which the Court balanced the competing equities. For these reasons, the
22 defendants intend to seek reversal of this ruling as part of the pending appeal. Because of the
23 critical importance to public safety, as well as public access and protection of park resources that
24 is tied to the proper repair and maintenance of the Loop Road, the Court should stay the
25 injunction pending appeal and allow the repairs to proceed.

26 The defendants previously submitted evidence regarding the Loop Road project,
27 principally through the Seventh Tollefson Declaration. Docket No. 342 and Exhibits 10-11. The
28 defendants incorporate those documents by reference in support of the present stay request. In

1 addition, the defendants present further evidence and sworn testimony through the attached
 2 Declaration of Patrick Flynn, a licensed professional civil engineer who has worked for the
 3 Federal Highway Administration (FHWA) for more than 26 years. Flynn Declaration, ¶ 1.
 4 During the past five years, he has been “responsible for managing roadway design and
 5 construction projects in Yosemite National Park,” four other national parks in California, and
 6 several U.S. Forest Service highway projects in northern California. *Id.*

7 In his declaration, Mr. Flynn describes the basic plan of work that the park has proposed
 8 in the Loop Road Environmental Assessment (EA) and FONSI:

9 (a) Replacement of deteriorated and undersized drainage culverts, as well as
 10 adding new drainage culverts where necessary, in order to reduce the likelihood of
 flooding and roadway saturation which leads to pavement distress;

11 (b) Pulverization of the existing roadway, which will correct the rutting and
 12 cracking problems and provide a stable and uniform base on which to place the
 new asphalt surface; and

13 (c) Placement of four new inches of asphalt surface to provide a smoother and
 14 safer surface for vehicles, in addition to raising the profile (i.e., vertical) grade of
 15 the roadway by four inches, thereby reducing the length of roadway subjected to
 flooding under the more extreme weather events.

16 Flynn Declaration, ¶ 8.

17 Mr. Flynn next discusses the existing deficiencies of the Loop Road and specifically
 18 identifies “the negative impacts associated with delaying the completing of this roadway
 19 rehabilitation project.” *Id.*, ¶ 2. Mr. Flynn refers to the Roadway Inventory Program (RIP),
 20 established jointly by the NPS and FHWA. As he explains, the RIP “identifies specific
 21 deficiencies for individual road segments and provides recommendations for actions needed to
 22 bring a particular roadway up to (or maintain) its designated standards based upon topography
 23 and traffic volumes, as well as establish a maintenance program.” *Id.*, ¶ 3. Mr. Flynn attaches
 24 as Exhibit 1 to his declaration the RIP data for the Loop Road from two different surveys, taken
 25 in December 1999 and August 2003, respectively. The purpose of that data is to show a “snap-
 26 shot in time” of the roadway conditions as they then existed. *Id.* Mr. Flynn summarizes the
 27 significance of that data:

28 Here, the 2003 data illustrates how rapidly the condition of the Yosemite Valley Loop
 Road has deteriorated. Roadway conditions for the majority of the Yosemite Valley Loop

1 Road in 1999 were rated as “FAIR”, whereas the condition of the roadway was deemed
2 “POOR” just three years and eight months later.

3 *Id.* Mr. Flynn explains how the quantitative method that the FHWA has developed to assess the
4 condition of a roadway by examining a number of variables, which include pavement roughness,
5 surface conditions, cracking, and patching. He notes that a “Pavement Condition Rating of less
6 than 60 is considered “POOR.” *Id.* “The 7.2 miles of the Yosemite Valley Loop Road included
7 in the rehabilitation project had an average rating of 47,” which placed it well down in the
8 “POOR” category in August 2003. “Because the condition of the roadway was inventoried and
9 classified more than three years ago, and no major rehabilitation projects have been undertaken
10 since that time,” Mr. Flynn concludes that “the Yosemite Valley Loop Road in 2006 is in
11 noticeably worse condition than it was in 2003.” This testimony is clear and compelling proof of
12 the need for the park to undertake the repairs and rehabilitation called for in the Loop Road
13 project now, without waiting for several more years while the roadway condition inevitably and
14 significantly worsens.

15 While Mr. Flynn notes that the park has taken several minor temporary repairs since
16 2004, including placing a “micro seal” on portions of the road, annually repairing potholes, and
17 starting work on the recent culvert improvements authorized by the Court at the October 16,
18 2006 hearing, he testifies and explains why “these repairs *have not corrected the major problems*
19 *with the roadway.*” *Id.*, ¶ 4 (italics in original). “A micro seal does not correct subgrade
20 deficiencies of the roadway. Annual pothole repairs consist of filling potholes with cold asphalt.
21 Culvert repairs approved by the court that are currently underway, represent only a portion
22 (approximately one-third) of total culvert repairs needed. Numerous culverts along other
23 sections of the Yosemite Valley Loop Road remain to be repaired.” *Id.*

24 Not only is the current condition in need of immediate repair, but also the “further
25 stressed a roadway becomes, the quicker it deteriorates as evidenced by the rapid deterioration
26 the roadway is currently experiencing.” *Id.*, ¶ 5. Mr. Flynn describes the future of the Loop
27 Road under the terms of the injunction in stark terms:

28 Without immediate rehabilitative work, the current problems with pavement
rutting, cracking, potholes, shoulder degradation, and slope failures will become

1 progressively worse. These problems pose a threat to the safety of Park staff and
2 the traveling public, such as swerving to avoid potholes or dropping a tire off the
3 edge of a deteriorated shoulder, and either going down the slope or over-
correcting and crossing into an ongoing lane of traffic.

4 *Id.* That is the reality of what will occur in the near future, expressed in the testimony of an
5 experienced civil engineer from an independent federal agency who is not affiliated in any way
6 with the NPS and who is responsible for overseeing and maintaining the public safety of the
7 Loop Road for the FHWA.

8 But even the evident and significant decline in roadway condition from FAIR to POOR
9 between 1999 and 2003 does not describe the full extent of the problem. “A key point to note is
10 that the rate of deterioration for a roadway is not linear. Rather, it accelerates annually as the
11 progressive rutting and cracking facilitates the intrusion of more surface water, accelerating the
12 freeze-thaw deterioration and degradation of the subgrade” beneath the Loop Road’s surface. *Id.*
13 Mr. Flynn concludes that “[a]ny further delay in rehabilitating the Yosemite Valley Loop Road
14 will certainly exacerbate the deterioration because time is a constant factor working against the
15 stability of a heavily weathered roadway with high traffic volumes.” *Id.* Those factors had
16 prompted the FHWA and NPS to plan the rehabilitation work during the fall of 2006, which the
17 Court now has enjoined. If the injunction is not stayed during the appeal and remains in place for
18 several more years while the park prepares a new CMP, the “litigation related delays associated
19 with this project will certainly lead to further accelerated deterioration of the roadway which
20 increases the likelihood of impacts to the safety of the traveling public.” *Id.*

21 The annual phenomenon of flooding also contributes to the problems faced by the road,
22 as sections of the Loop Road often are “completely inundated with water during spring runoff or
23 during heavy storm events.” *Id.*, ¶ 7. Mr. Flynn provides several photographs to document this
24 condition, attached as Exhibit 3 to his declaration. The flooding from both large and more
25 frequent meteorological events in the park poses “a continual threat to the proper functioning and
26 safety of the road, thereby exacerbating and increasing the rate of deterioration which makes the
27 Yosemite Valley Loop Road more hazardous even during non-weather conditions.” *Id.*
28

1 Finally, Mr. Flynn addresses what needs to be done, in his professional opinion and based
2 on his several decades of highway engineering experience. "Proceeding immediately with the
3 Yosemite Valley Loop Road rehabilitation project is imperative in order to correct severe
4 pavement distress experienced on several sections of the roadway, to minimize the effects of the
5 roadway caused by flooding and freeze-thaw events, and to ultimately provide for a safer
6 roadway for Park visitors and staff to travel on." *Id.*, ¶ 9 (emphasis added). Unlike the recent
7 localized spot repairs and temporary resurfacing, the Loop Road project will provide an overdue
8 and necessary long-term solution. "Upon completion of this project, the National Park Service
9 will not need to perform anything beyond light maintenance on the repaired sections of this
10 roadway for many years." *Id.* In addition, Mr. Flynn concludes by noting the very real benefits
11 to park resources, which include the protection and enhancement of the Merced River's ORVs.
12 Namely, he points out that this road repair was specifically designed to prevent and discourage
13 visitors from leaving the roadway and damaging fragile resources:

14
15 Other tangible benefits of proceeding with this rehabilitation project will be to
16 provide a better defined roadway edge, one that will discourage resource impacts
17 adjacent to the roadway; as well as a reduction in sedimentation and erosion
18 occurring along the roadway edge because a more stable, engineered-base and
19 roadway surface will be provided which will greatly reduce or eliminate the
20 shoulder degradation and edge raveling that is currently common along this
21 roadway. *Id.*

22 Based on this testimony and the supporting documentary exhibits, Mr. Flynn has made a
23 clear and compelling case for allowing the park to proceed immediately with the repair and
24 rehabilitation work outlined in the Loop Road project. The natural resource areas and values
25 near the road will be protected, not harmed, by allowing the work to take place while the park
26 develops a new CMP.

27 As Superintendent Tollefson's supporting testimony again makes clear, the Loop Road
28 project will not result in any construction of new roadways or sections or roadways, "nor will any
29 additional roadside pullouts or parking spaces be constructed." Tollefson Eighth Declaration, ¶
30 9. All work "will remain within the existing road prism. There will be no realignment as the
31 project only rehabilitates the existing road and roadside turnouts." *Id.* Contrary to the plaintiffs'

earlier allegations – unsupported by any evidence – which the Court nonetheless appears to have accepted, there “will be no increase or change of user capacity within the river corridor, nor will the project predetermine or prejudice user capacity in the Merced River corridor.” *Id.*, ¶¶ 9, 11. Because the maintenance and repair work on the Loop Road Project will have no material change whatever on the status quo with regard to the types or levels of visitor use, there is no rational basis to enjoin these repairs, which are absolutely essential for safe access to Yosemite Valley. The park requests that the Court stay the injunction to allow the Loop Road project to proceed during the pendency of the appeal.

2. The Defendants Have Presented Serious Questions on Appeal and Are Likely to Succeed on the Merits of the Appeal

The defendants have filed a notice of appeal from the Court’s Injunction Order and the underlying summary judgment opinion and order. On appeal, the defendants will present several grounds to overturn those rulings. The defendants, at a minimum, have raised serious questions regarding the validity of the Court’s rulings and, alternatively, are likely to succeed on the merits of these issues on appeal for the reasons summarized below.

The Court ruled that the Revised CMP must be set aside because it was not presented to the public as a single, comprehensive, “wholly self-contained” plan that “contains all management decisions and environmental analyses.” 439 F. Supp. 2d at 1092.^{4/} Reversal of this ruling on appeal is warranted because the Court has misinterpreted the Ninth Circuit’s rulings, particularly the April 2004 order relating to injunctive relief. The court of appeals’ 2004 order was in response to the plaintiffs’ emergency motion for injunction pending appeal, and the court of appeals was concerned with injunctive relief, particularly the district court’s decision to allow

^{4/} The Court stated that, “because the Ninth Circuit found the 2000 MRP to be invalid, the 2005 Revised Plan cannot logically refer to it and rely on it, as a separate, existing entity, to create a ‘new or revised’ plan.” *Id.* at 1093. The Court found that the Service erred when it “proceeded from the assumption that the 2000 MRP still exists.” *Id.* The Court found that amending the 2000 plan to cure the two deficiencies “does not comply with the Ninth Circuit’s directions.” *Id.* at 1094. “This court finds that language from the Ninth Circuit indicates an intention that a single document be produced, covering everything.” *Id.*

certain projects to go forward in the river corridor. The circuit court directed the district court to reconsider the question of injunctive relief and issued “a temporary stay of proceedings and an injunction prohibiting NPS from implementing any and all projects developed in reliance upon the invalid CMP.” 366 F.3d 731. At the same time, the court of appeals stated that “[p]ursuant to our original Opinion, the National Park Service (“NPS”) must prepare a new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal.” *Id.* (emphasis added). If the court of appeals had intended to instruct the NPS to prepare a “self-contained” CMP that did not rely on the 2000 CMP, it would not have provided the option of preparing a “revised” CMP. There is nothing in either of the Ninth Circuit’s two orders requiring “that a single document be produced, covering everything.” Rather, the circuit’s focus was on remedying the two deficiencies that it identified in its October 2003 opinion. This Court’s ruling on remand that the NPS produce a “wholly self-contained Plan” is not required by the court of appeals’ rulings or WSRA, nor is it required by NEPA or the Council on Environmental Quality regulations. Reversal on this issue is therefore warranted.

The defendants also raise serious questions regarding the Court’s ruling striking down the 2005 CMP’s user capacity provisions on the grounds that it conflicts with the court of appeals’ rulings and with the statute. As the court of appeals recognized in its October 2003 opinion, the statute does not define or otherwise explain the key phrase directing a federal agency to “address” the term “user capacities.” 348 F.3d at 796.^{5/} The court of appeals stressed that the

^{5/} The court of appeals found that the plain meaning of this phrase was that “the CMP must deal with or discuss the maximum number of people that can be received” at a Wild and Scenic Rivers segment. 348 F.3d at 796. The court concluded that the WSRA § 1274(d)(1) directive to address user capacities requires “only that the CMP contain specific measurable limits on use.” *Id.* at 797. “This does not mean that the NPS is precluded from using the VERP to fulfill the user capacities requirement. However, the WSRA does require that the VERP be implemented through the adoption of quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities. If the NPS is correct in projecting that it will need five years to fully implement the VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary limits of some kind.” *Id.*

1 agency had discretion in determining how to develop an “actual measure of user capacities.”^{6/}
 2 The 2005 revised CMP complied with that ruling and with WSRA by including a series of actual
 3 measures of user capacity in the plan.

4 The defendants will demonstrate on appeal that this Court erred by holding that the 2005
 5 CMP is invalid because VERP is improperly “reactive.” *See* 439 F. Supp. 2d at 1100. This
 6 finding is directly contrary to the court of appeals’ holding that the Service could address user
 7 capacities “by setting limits on the specific number of visitors, by monitoring and maintaining
 8 environmental and experiential criteria under the VERP framework, or through some other
 9 method.” 348 F.3d at 796 (emphasis added). The CMP shows that VERP works by establishing
 10 desired environmental and experiential conditions, describing management actions to achieve the
 11 conditions, then monitoring through indicators and numeric standards to measure success, as
 12 permitted by the court of appeals. In VERP, even existing conditions are evaluated against the
 13 numeric standards. If, at any time, conditions noted by the continuous monitoring process begin
 14 to deteriorate, then actions are taken. The standards are set to be triggered well before there is
 15 degradation, and the 2005 CMP makes clear that management action pursuant to VERP need not
 16 await actual violation of a standard. *See* 2005 CMP at II-33. The Court thus erred in finding that
 17 VERP contemplates management action only after degradation to ORVs has occurred.

18 The defendants also will demonstrate that the Court confused the interim limits, which
 19 are temporary, with VERP, which is not. *See* SEIS at III-19-20. While the “interim” limits may
 20 disappear once VERP is fully operational, VERP itself is in no sense temporary. Reversal of this
 21 ruling on appeal is warranted. In addition, the park’s use of existing capacity limits as interim
 22 limits was appropriate. The court of appeals stated that the park could use VERP as a tool within
 23

24
 25 ^{6/} This could be done “by setting limits on the specific number of visitors, by monitoring
 26 and maintaining environmental and experiential criteria under the VERP framework, or through
 27 some other method.” 348 F.3d at 796. The court reiterated that “we do not read §1274(d)(1) to
 28 require that the administering agency advance one particular approach to visitor capacity in all
 circumstances (e.g., a head count on all entrants to Yosemite),” and “the Secretarial Guidelines
 do not specify that this [user capacity] obligation can be satisfied only by capping the number of
 visitors.” 348 F.3d at 796-797.

1 its user capacity management program. The 2005 CMP followed this approach. It addressed the
2 problem identified by the court of appeals by establishing concrete standards and indicators.

3 The defendants' appeal also raises serious questions that warrant reversal on the NEPA
4 issues. All of plaintiffs' NEPA claims against the EIS prepared for the 2000 CMP were rejected
5 in the last round of this litigation. *See Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d at
6 1118-19 (E.D.Cal. 2002); *Friends of Yosemite Valley v. Norton*, 348 F.3d at 803. Nevertheless,
7 this Court required the Service to prepare an SEIS along with the revised CMP, and the Service
8 complied. The new SEIS is lengthy and detailed, but its analysis is focused on two elements that
9 were found deficient by the court of appeals. *See* SEIS at 1-6 ("[t]he plan must remedy the
10 deficiencies identified by the Court"). Consistent with this focus, the SEIS analyzed a "no-action
11 alternative" that was based on the 2000 CMP without the two corrective actions required by the
12 court of appeals. It also analyzed the alternative which ultimately became the 2005 revised CMP
13 (alternative 2) and two other "action alternatives" which took a different approach to addressing
14 user capacity by limiting the number of users in each segment of the river corridor. All three
15 action alternatives included the VERP framework as one component, as the court of appeals
16 specifically made clear that VERP was an acceptable approach to addressing user capacity, so
17 long as it included specific, measurable limits.

18 The court of appeals is likely to overturn the holdings invalidating the SEIS, which flow
19 directly from the conclusion under WSRA regarding the status of the CMP. The fact that this
20 Court required preparation of a "supplemental EIS" confirms that it was proper for the park to
21 focus on an analysis that supplemented the EIS done for the 2000 CMP by curing the two
22 specific deficiencies. The Court improperly substituted its view of the appropriate definition of
23 the no action alternative for the view of the expert agency. *See, e.g., Association of Public*
24 *Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997)
25 (accepting agency's definition of status quo for purposes of no-action alternative); *American*
26 *Rivers v. F.E.R.C.*, 201 F.3d 1186, 1200-1201 (9th Cir. 2000) (describing difficulty of defining
27 appropriate no-action alternative in situation of ongoing action and applying deferential standard
28

1 in upholding NEPA alternative analysis). The NEPA ruling also failed to give appropriate
 2 deference to the agency's structuring of its alternatives analysis. *See Westlands Water Dist. v.*
 3 *U.S. Dept. of the Interior*, 376 F.3d 853, 871 (9th Cir. 2004) (finding that the court's holding
 4 striking down alternatives "fails to give Interior the discretion due agencies under NEPA").

5 Finally, as demonstrated in detail above, the defendants have presented serious questions
 6 regarding the propriety of granting injunctive relief, particularly with regard to the Utilities
 7 Project and the Yosemite Valley Loop Road Project. For these reasons, the Court should find
 8 that the defendants have raised serious questions going to the merits of the issues being raised on
 9 appeal or, in addition, find that the defendants have a likelihood of success on the merits of the
 10 appeal. Combined with the clear balance of harms discussed above and the overriding public
 11 interest, this factor warrants granting a stay of the injunction pending appeal.

12 **3. The Public Interest Strongly Favors a Stay Pending Appeal**

13 The defendants submit the Eighth Declaration of Michael J. Tollefson, Superintendent of
 14 Yosemite National Park, to provide information demonstrating why these two vital repair
 15 projects, currently enjoined by the Court, must be allowed to be proceed during the pendency of
 16 the appeal and while the NPS prepares a new CMP. Mr. Tollefson explains that the Utilities
 17 Project and the Loop Road Project "both contain elements that, if left unchecked for the duration
 18 of this appeal process, would put the operation of the park—and health of natural resources and
 19 public safety—in jeopardy." Tollefson Eighth Declaration, ¶ 3. He notes that a stay is warranted
 20 because "these specific projects will restore and protect natural and cultural resources, while
 21 enhancing the visitor experience and making Yosemite a safer place to visit." *Id.* Even though
 22 the Court has ruled that the park must prepare a new CMP, the NPS remains required by law to
 23 operate and maintain "one of the nation's premiere national parks," and "the safe and orderly
 24 operation of Yosemite—which requires the ongoing completion of necessary repairs to
 25 infrastructure within the Merced Wild and Scenic River corridor—must be allowed to continue,
 26 even during the ongoing legal challenge." *Id.* The Superintendent states that, given the
 27 importance of these two projects, "the NPS is prepared to implement on-site activities as soon as
 28

possible.” *Id.* The harm to the overall public interest that will result from enjoining these two projects during the pendency of the appeal and perhaps even longer, until September 30, 2009 when the park completes the new CMP, far outweighs any possible harm that the plaintiffs could allege from the absence of a “valid CMP.” This is particularly true because the projects either will not materially change the environmental status quo in the case of the Loop Road and will significantly improve the environmental status quo in the case of the sewer repairs under the Utilities Plan project.

As Mr. Tollefson demonstrates, “[p]roceeding with maintenance repairs to the Yosemite Valley Loop Road project is critically important. The Loop Road is the only road into and out of Yosemite Valley and is used by all Valley visitors.” *Id.*, ¶ 6. Apart from this direct and obvious adverse impact to the more than three million members of the public who remain interested in visiting Yosemite Valley annually, the Loop Road is needed to “manage and conduct essential park operations, such as law enforcement, fire management, emergency medical services, and facilities maintenance.” As he points out, however, “the substructure of the roadway and much of the asphalt paving is now in extremely poor condition, making the road in places subject to serious failure.” *Id.* He concludes that the “litigation related delays of this roadway rehabilitation project clearly compromise the safety and welfare of the traveling public because roadway deterioration happens at an exponential acceleration rate.” That harm far outweighs any possible benefits that the plaintiffs could identify from the injunction that prevents the park from maintaining the road for the next several years.

Mr. Tollefson reiterates his earlier testimony regarding the potential impacts from the proposed road repair work, emphasizing that:

- Absolutely no new roadways or sections of roadways will be constructed, nor will any additional roadside pullouts or parking spaces be constructed.
- This maintenance and repair project will remain within the existing road prism. There will be no realignment as the project only rehabilitates the existing road and roadside turnouts.

- 1 • There will be no increase or change of user capacity within the river corridor, nor will the
- 2 project predetermine or prejudice user capacity in the Merced River corridor.
- 3 • There will be no increase in the number of parking spaces.

4 *Id.*, ¶ 9. Moreover, he demonstrates that a “detailed environmental evaluation of the Loop Road
 5 project has been completed and documented in the Rehabilitation of the Yosemite Valley Loop
 6 Road Environmental Assessment and Finding of No Significant Impact. A full analysis of both
 7 floodplain and wetland values has been documented in the EA and FONSI, and the park has
 8 concluded that there will be beneficial effects to both resources. (YVLR FONSI, Pg 1-11.)” *Id.*,
 9 ¶ 10. The existing injunction “would further exacerbate the adverse effects to the river, whereas
 10 allowing the road maintenance will help protect and enhance its hydrological and biological
 11 values.” *Id.* The public interest clearly supports allowing this repair work to proceed because it
 12 will benefit, not harm, the Merced River ORVs.

13
 14 The Superintendent also refutes the plaintiffs’ theory that the project would result in
 15 increased and harmful impacts to the river and nearby trails. As Mr. Tollefson explains, under
 16 this flawed logic, “the entire road system would need to be shut down, as the river is readily
 17 accessible from almost all portions of the Valley Loop Road. Moreover, as the EA establishes,
 18 and as I have confirmed, all of the turnouts involved in this project exist now and are accessed by
 19 park visitors. The road project will not cause any increased use of the river corridor.” *Id.*, ¶ 11.

20 “The NPS is prepared to proceed with this maintenance project that will repair a
 21 deteriorated road and restore natural hydrologic flows under many sections of the road way. On
 22 September 8, 2006, prior to the November 3, 2006 injunction, the Federal Highway
 23 Administration awarded a \$14,711,407 contract, and obligated this funding for full
 24 implementation of the Loop Road project.” *Id.*, ¶ 12. “The contractor is presently on site, and as
 25 authorized by the District Court has initiated work on a limited portion of the project.” *Id.* Mr.
 26 Tollefson concludes that “[l]oss or reduction of access over this road will result in substantial
 27 harm to the public. Loss or reduction of access over this road also imperils the NPS’s ability to
 28 protect the Valley’s natural and cultural resources in the event of fire or other natural disasters.”

1 The Court should not and, the defendants respectfully submit, cannot allow that result to occur in
2 the public interest.

3 Superintendent Tollefson's Eighth Declaration provides similarly persuasive evidence
4 regarding the balance of harms and the public interest in staying the injunction and allowing the
5 Utility Plan to proceed. "Should the NPS continue to be enjoined and prevented from repairing
6 the failing sewer system, the NPS would be placed in the position of having to violate the CAO."
7 *Id.*, ¶ 14. "Alternatively, the NPS would be forced to implement other drastic actions likely to
8 cause public harm, such as closing campgrounds and facilities, or by limiting or preventing
9 public access to key locations in Yosemite Valley and/or to other river segments. These types of
10 actions would likely have dramatic negative effects on the economics of the Yosemite region and
11 cause serious public harm." *Id.* "As environmental stewards and land managers, the NPS cannot
12 responsibly delay these critical utility repairs. With every passing day, the risk of public harm
13 increases as these failing sewer lines continue to further decay." *Id.* "Additional delay will
14 undoubtedly lead to additional system failure and the increased likelihood of harmful sewage
15 spills; long term delay may require the NPS to take actions that unnecessarily result in either
16 serious ecological or economic damage, neither of which is in the public interest." As a result,
17 Mr. Tollefson concludes that the NPS should be allowed to proceed with these important repairs
18 immediately.
19

20 If the injunction remains in place and the NPS is forced to repair *all* segments of the
21 system in-place under the CIP, rather than as set forth in the IUMP, then the injunction clearly
22 will injure the public interest by causing, not preventing, environmental harm in Yosemite Valley
23 and in the Merced River corridor. "Rehabilitating sewer lines that are currently located in
24 sensitive resource areas will result in the continued presence of these utility corridors in
25 meadows and riparian areas for decades to come. This is due to the fact that the Congressional
26 funding process for NPS projects of this magnitude makes it extremely unlikely that Congress
27 would appropriate additional funds in the near term to Yosemite when so many other parks are
28 desperately in need of funds to address their antiquated infrastructure needs." *Id.*, ¶ 17.

Moreover, allowing the utility repairs to proceed “will not cause increased visitation or use of the park.” *Id.*, ¶ 22. The sewer repair work under Phases 2 and 3 of the IUMP will not impact user capacity, nor will they prejudice any future park decision about user capacity in the new CMP. Rather, the “decisions about pipe sizes and slopes were made to bring the Valley sewer system in line with modern engineering standards.” *Id.* In contrast, to “delay these projects for as long as a two or three years will almost certainly cause irreparable harm to the river system and public health and safety by exposing people and natural resources to the risk of accidentally-spilled untreated sewage and contaminated surface and ground water.” *Id.*, ¶ 23. Finally, he explains that implementation of these projects “is also in the public interest because these projects will allow natural resource restoration to occur in meadow and wetland areas along the river.” *Id.*

In conclusion, Superintendent Tollefson summarizes the reasons why the injunction should be stayed pending appeal to allow these two critically important projects to proceed:

As Superintendent, I firmly believe that Yosemite National Park must be allowed to function and keep the park in safe operation while we pursue the next steps in fulfilling our WSRA requirements. We cannot stop the important resources protection and visitor-related operations of the park. We cannot close the gates until the ongoing litigation is complete. This litigation must allow a reasonable solution to ensure that both river values and visitor access can be protected. As stewards entrusted with preserving of one of the world’s most renowned treasures, we have a duty to move ahead with the important day-to-day work of protecting Yosemite National Park.

Id., ¶ 24. The overriding public interest in this case clearly warrants a stay of the injunction pending appeal with respect to the Utilities Plan and the Loop Road Project.

IV. CONCLUSION

The defendants request that the Court grant the defendants’ motion for a stay of the permanent injunction pending appeal with regard to the Utilities Plan and the Loop Road projects. The defendants have commenced the development of a new CMP that will comply with the Court’s ruling. That new CMP, however, will not be completed until September 30, 2009, and, in all likelihood, will be subject to further legal challenges from the plaintiffs and a request for continued injunctive relief after the NPS issues a record of decision for the new plan.

1 Preventing the park from taking the essential repair and maintenance work on the utilities and
 2 loop road in Yosemite Valley until the new CMP is approved and confirmed as valid will only
 3 serve to harm, not protect and enhance, the Merced River and its ORVs. The defendants have
 4 demonstrated the urgent need to proceed immediately with repairs on those two projects during
 5 the pendency of the appeal. For the reasons set forth in this memorandum and the supporting
 6 declarations and exhibits, the defendants request that the Court stay ¶¶ 8 and 12 of the November
 7 3 Injunction Order and allow the park to take the necessary measures to protect these resources
 8 and the public safety by implementing these two projects.

9 Respectfully submitted this 26th day of January, 2007.

10
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